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the Judiciary, or the President, which should be denied to the states—as integral parts of the federal government. Must the treaty-power timidly pause at the doors of Congress, at the threshold of the Hall of Justice, or at the doorstep of the White House and confess its impotency to deprive any one of them of one jot or tittle of their constitutional power, and yet with measured tread march ruthlessly over the states which constitute the basic foundation of the government itself?<sup>21</sup>

To maintain the unlimited supremacy of the treaty-making power by deciding that it can abrogate the rights reserved to the states, is to rewrite Article VI so as to read: "The *Federal Government* . . . and all treaties made under the authority of the Federal Government, shall be the supreme law of the land." But the Constitution does not say that. The Constitution, as amended does not embrace federal powers only. It is an instrument which reserves certain powers to the states just as much as it is one which declares the power of the national government. The federal judge protected those state powers against the act of the President and a majority of the Senate and House of Representatives.<sup>22</sup> To be consistent—and incidentally, to follow the Constitution—he should have protected them against the act of the President and two thirds of the Senate.<sup>23</sup>

A. L.

THE CONTINUANCE TO WORK UNDER UNUSUAL ADDITIONAL RISKS AS A BAR TO RECOVERY FOR PERSONAL INJURIES SUSTAINED.—It is clearly settled law in the United States that a party subjected to the negligent act of another where a duty to avoid such negligence exists is bound to exercise reasonable care to avoid injury as a result of such negligence upon recognition of the risk arising therefrom. Many recent cases, however, fail to fully recognize the modern tendencies, which, without changing the rule, have altered its application.

A particular example of this failure to recognize modern interpretations of old rules is the case of *Hicks v. The Southern Ry. Co.*,<sup>1</sup> where the court held that it was proper to sustain a demurrer to the allegations of the plaintiff that, while employed as a railway postal clerk, he had contracted an illness as a result of exposure in a mail car, which the defendant had failed to heat. In the language of the Court: "The law imposed upon the plaintiff the duty of avoiding the negligence of which he fully knew; and since he did not avoid it, he failed to use ordinary care for his own safety." The sole point, upon which the conclusion of the plaintiff's contri-

<sup>21</sup> Henry St. George Tucker: *Limitations on the Treaty-Making Power*, p.

<sup>412.</sup>

<sup>22</sup> U. S. v. Shauver, *supra*.

<sup>23</sup> U. S. v. Thompson, *supra*.

<sup>1</sup> 99 S. E. 218 (Ga. 1919).

butory negligence can be based, is the mere fact of continuing to fulfill his duty to the Government instead of refusing to work under conditions which were probably an additional hazard but which were by no means certain to produce any positive damage. This decision appears improper upon two grounds. First, the determination of negligence, either original or contributory, is a question of fact to be measured by the rule of conduct of a reasonably prudent man, and as such the Court erred in not leaving its determination to the jury. Second, even if the allegations might be deemed demurrable, the court fails to apply the standard of reasonable care in any logical or reasonable manner.

The practice of permitting demurrs or analogous procedures to determine whether a cause of action or defense exists, is based on the theory that the courts should not allow time to be wasted by permitting juries to determine findings where, under the facts admitted, there would be only a single conclusion possible in accordance with the law. These procedures were not created for the purpose of transferring part of the functions of the jury to the court but to have conclusions of law determined with a minimum of delay. Recently they seem to have been permitted to prevent excessive sentimentalism from effectuating injustice and producing verdicts not consistent with the law. Under the present accepted theory of the Jury System, however, the use of such procedures should be most sparing when utilized for the latter object.<sup>2</sup>

The true method of determining negligence, in cases of this character, is to compare the conduct of the allegedly negligent party in each case with the conduct of a reasonably careful man under the circumstances in which the alleged negligent man found himself.<sup>3</sup> This rule should be applied in accordance with the real meaning of its wording, rather than in the somewhat artificial manner that has been the practice of the courts in the past.<sup>4</sup> In the case under consideration, therefore, the true question is: Did the plaintiff act as the reasonably careful man would have acted when confronted with the choice of refusing to continue to fulfill his duty of assisting in maintaining the postal service during time of war or of continuing to labor under circumstances that might or might not result in injury to himself? In *Hicks v. The Southern Ry. Co.*,<sup>1</sup> this is the sole issue, as the demurrer admits the truth of the allegation that the plaintiff had used all due care to avoid injury and there are no facts to controvert this deduction other than the mere continuance to work. The opinion here like so many opinions in cases of this character fails to recognize any distinction between the two quite separate defences of *contributory negligence*

<sup>2</sup> 4 Harv. Law Rev. 147; Note, 13 L. R. A. 728; Note, 15 L. R. A. 332.

<sup>3</sup> C. C. & C. R. R. v. Terry, 8 Ohio 570 (1858); Railroad Co. v. Gladmon, 82 U. S. 401 (1872); 9 Columbia Law Rev. 154; 62 U. of P. Law Rev. 320; 63 U. of P. Law Rev. 237.

<sup>4</sup> Railroad Co. v. Harmon, 147 U. S. 571 (1892); Darcey v. Lumber Co., 87 Wis. 245, 58 N. W. 382 (1894).

and *assumption of risk* and quite loosely terms the continuing to labor with knowledge of unusual risk as carelessness amounting to contributory negligence. In principle it would seem that if the distinction is sound in the relationship of master and servant there is no valid reason for confusing the two in cases of other relationships. The former denies recovery upon the ground that while the defendant has been guilty of a breach of his duty to the plaintiff, this breach of duty or negligence would not have caused the plaintiff any damage in the absence of the contributory negligence of the plaintiff or at least would not have been responsible for the entire extent of the damage. The defence of assumption of risk, on the contrary, is based upon the ground that the duty of the defendant toward the plaintiff has become limited by the knowledge of the latter that an additional risk exists so that in the eyes of the law there has been no breach of duty upon which to base a right of action. It is highly possible that the courts have felt that this second defence is of such dubious legal validity that they have deliberately refused to extend the doctrine to its logical conclusion and have confined its application to cases of the exact character in which it was first conceived and applied. Whether the doctrine is accepted in relationships other than master and servant is a rather academic question, however, as it is frequently used as a basis for refusing recovery under the guise of the defence of contributory negligence. Even under this disguise, however, the determination to undergo some risk, if it is no greater than that which a reasonably prudent man would deem justifiable to accept and undergo, is not contributory negligence *per se*.<sup>5</sup> Still less is this the case where the party charged with contributory negligence has a right to be in the situation where he was at the time of sustaining damage or has a duty to perform independent of his relationship with the party charged with the original negligence.<sup>6</sup> In one case where a fireman was fulfilling his duty of attempting to extinguish a fire in a railroad yard containing amongst other things a carload of explosives it was held that the jury was justified in not finding him guilty of contributory negligence even though he continued to work under highly perilous conditions knowing that a number of explosions had already occurred.<sup>7</sup> To attain a sound psychological result the courts should weigh in the balance, as does the reasonably careful man, the importance of duty to be fulfilled by the remaining at work in comparison with the degree of danger and risk incurred by so doing. In practice the courts tend to misinterpret the rules they lay down by almost

<sup>5</sup> Mobile & B. Ry. Co. v. Holborn, 84 Ala. 133, 4 So. 146 (1888); Chielinsky v. Hoopes Townsend Co., 1 Marv. 273, 40 Atl. 1127 (Del. 1894); Atlantic R.R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006 (1907); 2 Harv. Law Rev. 14, 91.

<sup>6</sup> Heaven v. Pender, L. R., 11 Q. B. Div. 503 (1883); Mason v. Yockey, 103 Fed. 265, 43 C. C. A. 228 (1900).

<sup>7</sup> Houston Ry. Co. v. O'Leary, 136 S. W. 601 (Texas 1911); 66 U. of P. Law Rev. 73.

invariably considering that mere knowledge that a risk exists creates an irrefutable reason for cessation of the labor exposing the injured party to such risk, failure to stop being deemed as sufficing in law to constitute contributory negligence and barring a recovery. As a matter of fact the reasonably prudent man does not consider the taking of some additional risks and chances at times for any number of different reasons as carelessness, but rather on the contrary considers that various other ends for example as the retention of his employment as an important a part of his duty of self-preservation as that of reducing to a minimum the necessary risks of life. Conduct that was more prudent than this would not in fact be that of the reasonably careful man but rather that of the excessively cautious man.

*G. B.*

**BILLS OF PEACE IN TORT CASES.**—The doctrine that equity will interfere to prevent a multiplicity of actions rests fundamentally upon the inadequacy of the legal remedy. The prevention of such multiplicity is a persuasive, but not a conclusive argument in favor of the jurisdiction. "The single fact that a multiplicity of suits may be prevented by the assumption of jurisdiction by equity is not enough in all cases to sustain it."<sup>1</sup> In cases where one person is forced to sue many, or numerous persons are forced to sue one, equity jurisdiction was originally exercised only where there was a certain privity, common right, or community of interest in the subject matter between the numerous parties, such as disputes between the lord of the manor and his tenants over the customs of the manor,<sup>2</sup> or between a parson and his parishioners over tithes.<sup>3</sup> Such were the original bills of peace. Under the natural expansion of equity, bills in the nature of bills of peace were granted to prevent a multiplicity of suits in varied classes of cases, in which there was strictly speaking no privity or common right between the numerous parties, and where there was often little more than a community of interest in the law and facts involved. Bills in the nature of bills of peace were allowed to establish a sole fishery right against many claimants,<sup>4</sup> to declare valid or invalid certificates held by some 1500 claimants for injuries occasioned by the bursting of a dam;<sup>5</sup> to invalidate false stock certificates fraudulently issued;<sup>6</sup> to enjoin a nuisance affecting many property holders;<sup>7</sup> to enjoin a continuing wrongful act injuring the property rights of many;<sup>8</sup> to enjoin suits against numerous insurance

<sup>1</sup> *Hale v. Allinson*, 188 U. S. 56 (1903).

<sup>2</sup> *How v. Tenants of Bromsgrove*, 1 *Vernon* 22 (Eng. 1681).

<sup>3</sup> *Brown v. Vermuden*, 1 *Ch. Ca.* 282 (Eng. 1676).

<sup>4</sup> *Mayor of York v. Pilkington*, 1 *Atkyns* 282 (Eng. 1737).

<sup>5</sup> *Sheffield Water Works v. Yoemans*, L. R. 2 *Ch. 8* (Eng. 1866).

<sup>6</sup> *N. Y., N. H. & H. R. Co. v. Schuyler*, 17 *N. Y.* 592 (1858).

<sup>7</sup> *Cadigan v. Brown*, 120 *Mass.* 493 (1875).

<sup>8</sup> *Ill. Cent. Ry. Co. v. Garrison*, 81 *Miss.* 257, 32 *So.* 996 (1902); *Ballou v. Inhabitants of Hopkinton*, 4 *Gray* 324 (Mass. 1855).